More fundamentally, there is no dispute at all that cable *does* offer high-speed transport, on standard terms to the general public. The only dispute is whether the bundling of that transport with some modicum of content is sufficient to completely insulate the transport component of the bundle from common-carrier regulation. It would be a quite different matter if the Commission were attempting to order cable operators to provide a transport service they did not already offer, either bundled or unbundled, on equal terms to everyone in their service area. But this is not the case.

Finally, there is no serious doubt that the Commission has the authority to order open access on cable, once it establishes that cable broadband is a "telecommunications service." That authority flows directly from the Commission's authority to order interconnection under sections 201 and 251(a).[74] Cox and NCTA argue that a cable operator's section 251(a) interconnection obligation is satisfied merely by allowing its subscribers to connect to unaffiliated ISPs by way of a long-haul Internet backbone connection.[75] But if that is so, then a CLEC providing voice service in a particular exchange likewise satisfies its section 251(a) obligation if a subscriber can complete a call to a customer in the same exchange over the facilities of a long distance carrier.

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communications services"); 47 U.S.C. § 541(b)(3) (exempting a cable operator's provision of telecommunications services from Title VI and franchise requirements); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979) ("A cable system may operate as a common carrier with respect to a portion of its service only."); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) (two-way, point-to-point, non-video communication transmitted over cable channels involves "common carrier activity," regardless of usual status of entity providing the service); *see generally* SBC/BellSouth at 28-29.

[74] *See* SBC/BellSouth at 29-30.

[75] Cox at 41; NCTA at 34.

The Commission has never suggested that mere interconnection with an interexchange carrier satisfies a LEC's obligation under section 251(a).[76]

Moreover, notwithstanding Comcast's bald assertion that there is "simply no way" a cable operator can be treated as an incumbent LEC,[77] Commission precedent quite clearly establishes that the incumbent cable providers are "comparable" to incumbent LECs in the provision of broadband, thus permitting their classification as incumbent LECs under section 251(h)(2).[78] In that case, all the resale and unbundling obligations of section 251(c) apply automatically to the broadband offerings of cable operators.

B. Implementation of a Title II Framework.

Despite the variety of comments in this proceeding, there appears to be substantial consensus over the obligations that would attach to cable broadband in the event the Commission determines to regulate it, like DSL, under Title II. As Chairman Kennard has explained, and as few commenters dispute, the construction of a Title II framework for cable broadband involves "go[ing] to the telephone world . . . and just pick[ing] up this whole morass of regulation and dump[ing] it wholesale on the cable pipe."[79] Our opening comments (at 31-38) review just what

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[76] *See Local Competition Order*, 11 FCC Rcd at 15991, ¶ 997.

[77] Comcast at 19.

[78] *See* SBC/BellSouth at 31.

[79] Remarks by Chairman William E. Kennard at the National Ass'n of Telecommunications Officers and Advisors, *Consumer Choice Through Competition*, Atlanta, GA (Sept. 17, 1999); *see also* Charter at iv (open access for cable means "price regulation, cost-of-service regulation, Unbundled Network Elements, and OSS"); CompTel at 2, 6 (open access regime for cable would involve "inevitable extension" of telephone company regulation, involving, among other things, unbundled spectrum at cost-based rates); Earthlink at VII (a Title II model requires "the same open access requirements that all other local facilities-based common carriers comply with today"); Qwest at 9 ("[C]able modem service easily fits into the pre-existing regulatory structure which has been developed for LECs.").

that would entail – spectrum unbundling, collocation, channel qualification and conditioning, performance monitoring, a prohibition on interLATA service, TELRIC-based pricing, resale discounting, contributions to universal service, separate affiliates for advanced services, and so forth.

Commenters also generally agree that there are no substantial technical impediments to requiring cable to comply with the unbundling requirements that currently apply to incumbent LECs. The cable industry's own association admits that it is "possible to assign each ISP its own channel."[80] NCTA further notes that carriers that rely on the dominant cable network will inevitably request "direct control over the network elements over which [their] packets are transmitting," and objects to this arrangement not on the grounds of technical infeasibility or space constraints, but merely because it would result in the cable operator's "loss of network management control."[81] Such transfer of "control" of a network element, however, is the whole point of an unbundling mandate – not an argument for leaving things bundled.[82]

To the limited extent that commenters question the feasibility of unbundling cable spectrum, they focus mainly on the notion that the cable network is a "shared" resource.[83] Yet while this fact may complicate the implementation of spectrum unbundling, it does not prevent

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[80] NCTA at 72 n.233; *see also* Excite@Home at 16 (the technical issues relating to open access, though "complex," are "not unsolvable"); Big Planet at 13; CompTel at 9-10.

[81] NCTA at 75.

[82] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15647, ¶ 292 (competitive carriers can use unbundled elements to "provide any telecommunications service that can be offered by means of the element"; such "flexib[ility]" is necessary to allow competitors "to respond to market forces").

[83] AT&T at 56; Cox at 21, 23; NCTA at 68-70.

it. As NCTA explains, even in the current, closed regime, the cable operator must "manage bandwidth by creating incentives for ISPs to limit their bandwidth use in reasonable ways."[84] There is no reason to think that cable operators could not continue to create such incentives in an open regime. Likewise, while Charter raises as its primary concern the question of traffic flow management over a shared resource, it acknowledges that the question could be resolved with "redesign of [the] traffic routing and management process as well as the operational process."[85]

Nor is it the case that the cable pipe, even if "shared," is insufficiently capacious to support spectrum unbundling.[86] Approximately 10 percent of upgraded cable systems is unused by video programming, and cable operators have "tremendous flexibility to reallocate system bandwidth."[87] Indeed, as Cox points out, cable operators "can install fiber optic lines closer to its end-users and split its service nodes" as necessary "to increase capacity and maintain data rates."[88] Likewise, Charter notes that it can "design and build a parallel network *within* a cable system: a separate CMTS, a separate six MHz downstream channel, and a separate 3.2 MHz upstream channel."[89] To be sure, such an effort might involve "design and performance costs,"[90] but there is no reason to believe that such performance issues cannot be remedied, or that the

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[84] NCTA at 73.

[85] Charter at 11.

[86] WorldCom at 17; Big Planet at 13; CompTel at 9.

[87] *McKinsey Broadband Report* at 39; SBC/BellSouth at 32.

[88] Cox at 24.

[89] Charter at 16 (emphasis added).

[90] *Id.*

design costs will be more formidable than the hundreds of millions of dollars incumbent LECs incurred (and continue to incur) to implement line sharing.[91]

Moreover, in the event spectrum allocation questions do arise, the Commission has any number of models for resolving space constraint disputes that flow from open access – ranging from the percentage formulas applicable to commercial leased access and OVS to the outright surrender of a facility as required of incumbent LECs in the DSL context.[92]

At bottom, the cable industry objects to unbundling not because it cannot be done, but because it will be complicated.[93] NCTA stresses that the Commission will have to address questions relating to traffic forecasting, how and when to port service to a competitor, customer authorization to switch ISPs, billing procedures, how to define connection interfaces, and how to allocate physical space at the head-end.[94] AT&T's Excite@Home notes that open access for

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[91] *See* Comments of SBC Communications Inc. at 21, *Deployment of Wireline Services Offering Advanced Telecommunications Capabilities*, CC Docket No. 98-147 (FCC filed June 15, 1999) ("SBC estimates that the cost of developing and implementing [line sharing] upgrades would be in the hundreds of millions of dollars, and that does not include all of the required systems changes or costs."). It is absurd to state, as AT&T does (at 98), that the costs of imposing open access on telephone companies is not "competitively significant."

[92] *See, e.g.*, Second Report and Order, *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223, 18248, ¶ 37 (1996) (if demand for carriage exceeds capacity, an open video system operator may select the programming services to be carried on no more than one-third of the system's activated channel capacity); 47 U.S.C. § 532(b)(1) (a cable operator with between 36 and 54 channels must designate for commercial access 10 percent of channels not otherwise required for use by law; an operator with between 55 and 100 channels must designate 15 percent of channels not otherwise required for use by law); Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, 20917, ¶ 6 (1999) ("*Line Sharing Order*") (where a customer elects a competing provider, the incumbent LEC must surrender the entire high frequency portion of the loop).

[93] *E.g.*, Charter at 9; Cox at 25; AT&T at 56.

[94] NCTA at 72 n.233, 80.

cable implicates questions of provisioning, installation, customer support, and billing.[95] Cox points out that unbundled access would lead to disputes about pricing.[96] The Commission has addressed each of these issues in its regulation of incumbent LECs.[97] There is no reason to doubt its ability to address them here.

Cable operators contend that subjecting them to the regulations that now burden incumbent LECs would violate the First Amendment.[98] If so, the regulatory burdens already placed on incumbent LECs do too.[99] The must-carry precedent suggests otherwise, however. Even Justice O'Connor, who dissented on First Amendment grounds from the Supreme Court's decision to uphold the must-carry regime imposed by the 1992 Cable Act,[100] has noted that "if

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[95] Excite@Home at 13.

[96] Cox at 25.

[97] *See, e.g., Line Sharing Order*, 14 FCC Rcd at 20988-1014, ¶¶ 178-220 (addressing spectrum compatibility and spectrum management issues); *UNE Remand Order*, 15 FCC Rcd at 3882-90, ¶¶ 421-437 (unbundling of OSS); Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 00-297, ¶¶ 24, 40, 50 (rel. Aug. 10, 2000) (establishing default national collocation intervals and adjacent collocation and space reservation policies); *Local Competition Order*, 11 FCC Rcd at 15844, ¶ 672, 15871, ¶ 738 (the TELRIC methodology for pricing leased access "encourage[s] efficient levels of investment and entry" and enables "incumbent[s] . . . to recover a fair return on their investment"); *see also* Comments of AT&T Corp., Decl. of M. Witcher and D. Rhinehart ¶ 55, *Application by SBC Communications Inc., et al., for Provision of In-Region, InterLATA Services in Texas*, CC Docket No. 00-4 (FCC filed Jan. 31, 2000) (TELRIC is the "*only* [pricing methodology] consistent with . . . sound policy") (emphasis added).

[98] AT&T at 25; Comcast at 26; Cox at 47; NCTA at 38-39; Cablevision at 15.

[99] So too with claims that open access implicates the Fifth Amendment. *See* Cox at 50; NCTA at 39 n.135.

[100] *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 229-30 (1997) (O'Connor, J., dissenting).

Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies."[101]

V. INTERMEDIATE REGULATION UNDER TITLE I OR TITLE II.

Some commenters argue that the Commission should opt for a middle ground between a market-based Title I framework and the heavy-handed regulation that applies to incumbent LECs under Title II. They argue that, regardless of the state of competition in the broadband market, open access regulation is necessary to support ISPs that have come to depend on purchasing discounted broadband transmission from a facilities-based provider.[102]

The purpose of regulation is to protect competition, not competitors.[103] Absent a broadband transmission bottleneck, there is simply no competitive justification for forcing facilities-based providers to provide wholesale broadband transmission, instead of relying on market forces to ensure that such an offering is available.[104] But the Commission might

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[101] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part and dissenting in part). The law review article submitted by Cox notes that "common carriers receive the lowest level of First Amendment protection by definition, for they do not have a recognized right to speak on their own and are denied editorial control over their communications traffic." Raymond Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 Tul. L. Rev. 87, 102 n.100 (2000) (citation omitted).

[102] AeA at 10-11; ACA at 14-15; Century Tel at 1-2; LavaNet at 1; CIX at 1-2; Big Planet at 8; Global Network Access at 1-2; WorldCom at 4; Brand X at 1-2. Brand X's allegations of "predatory pricing" by Pacific Bell are wholly unsubstantiated. Brand X at 2. Pacific Bell does not provide DSL service below its average variable cost, and, even if it did, it could not conceivably hope to recoup any losses in light of the many competing broadband providers in the market. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[103] *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

[104] *See* Michael Kende, Office of Plans and Policy, Working Paper No. 32, *The Digital Handshake: Connecting Internet Backbones*, at 12 (FCC Sept. 2000) ("In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

nonetheless conclude that broadband competition is not yet sufficiently well-established to justify complete deregulation. And as explained in our opening comments, the Commission does have a legal basis at hand for implementing such a half-way policy of partial deregulation.

The Commission may, for example, apply a variation of the *Computer II* framework to cable broadband, requiring incumbent operators to "virtually unbundle" a "basic" transmission service from any "enhanced" service offering, and to offer that basic service to other enhanced service providers on nondiscriminatory terms. The recent AOL/Time Warner consent decree tracks this approach, as do the cable industry's (pending) Boulder and (planned) Massachusetts trials.[105]

Alternatively, the Commission may create an intermediate regulatory structure under Title II, by declaring incumbent broadband providers to be *nondominant* telecommunications carriers and, hence, common carriers. Under this regime, incumbent operators would be required to provide nondiscriminatory interconnection pursuant to sections 201 and 251(a), but they would not be subject to the more onerous Title II requirements – spectrum unbundling and the like – that are premised on the existence of bottleneck power.[106]

If the Commission opts for either of these approaches, however, it must, again, apply them even-handedly to the incumbent cable operators and the incumbent LECs. If cable does not have sufficient broadband market power to warrant treatment as a dominant Title II carrier, incumbent LECs assuredly don't either.

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[105] AT&T at 61, 65; NCTA at 79.

[106] *See* SBC/BellSouth at 38-40.

For the same reasons, the Commission may not forbear from regulating the dominant cable operators unless it also de-regulates the nondominant telephone companies.[107] Forbearance is authorized only if, among other things, it "promote[s] competitive market conditions" and "enhance[s] competition among providers of telecommunications services."[108] As commenters recognize,[109] a policy of forbearance that reinforces the market leader's dominance by applying burdensome regulation to a *later* entrant with *less* market share cannot be said to do either.[110]

VI. INTERNET ACCESS IS NOT A CABLE SERVICE.

The final option posited in the *NOI* and addressed by commenters is the classification of broadband Internet access as a "cable service" subject to regulation under Title VI. Despite their recent efforts to avoid cable franchise fees for cable modem service,[111] the cable operators – and only the cable operators – argue in favor of this approach. But even they cannot agree on a rationale. AT&T and NCTA contend that Internet access is a "cable service" under the 1984

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[107] Century Tel at 6; CSE Foundation at 6; Verizon at 21-40; Earthlink at VIII-IX; *see* SBC/BellSouth at 41-42.

[108] 47 U.S.C. § 160(b).

[109] *See* Verizon at 22-23; Earthlink at 57; Alliance for Public Technology at 7-8; *see also* SBC/BellSouth at 41-42.

[110] Even if the Commission could lawfully distinguish between broadband over cable and the same service over the telephone network, there would be no basis for doing so in the context of universal service. The current system of universal service flies in the face of competitive neutrality: DSL providers now contribute 6.6827 percent of their revenues to the fund, while cable modem service providers are exempted. Moreover, the Commission's obvious interest in the economic stability of the fund demands that it *broaden* the base of contribution, not narrow it on the basis of arbitrary statutory distinctions.

[111] *See* Leslie Cauley, *Two Firms Offering Web Via Cable Seek to Avoid Paying Franchise Fees*, Wall St. J., Jan. 8, 2001, at B10 (in light of the Ninth Circuit's *City of Portland* decision that cable modem service is not a cable service, "Cox and AT&T are now arguing that their high-speed Internet services . . . are exempt from [cable franchise] fees, at least in the areas covered by the [Ninth Circuit]").

Cable Act, and that the 1996 Act changed nothing.[112] By contrast, Comcast argues that Internet access was *not* a "cable service" under the 1984 Cable Act, but that the 1996 Act made it one.[113]

Neither argument is correct. Under the 1984 Cable Act, Internet access over cable could be considered a "cable service" only if it involved the transmission to (1) "subscribers" of (2) "other programming service."[114] It did neither. A "subscriber" is (and has been for some time) "a member of the general public who receives broadcast programming distributed by a cable television system."[115] Though cable operators offer Internet access as a bundle with video service, they also offer it separately, to customers who do not "receive[] broadcast programming." It is impossible to believe that Congress intended the classification of cable modem service to vary depending on whether a particular consumer did or did not also subscribe to the provider's video programming.

Nor can Internet access be considered "other programming service" – which the 1984 Cable Act defined as "information that a cable operator makes available to all subscribers generally."[116] Internet access delivers information content that is plainly not "available to all subscribers generally," such as the content of email messages, or on-line financial services. Moreover, Internet access requires the use of software that communicates a unique Internet

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[112] AT&T at 12; NCTA at 6.

[113] Comcast at 16; *see also* Cox at 26-27 (arguing that cable modem service is a cable service under the 1996 Act definition).

[114] Pub. L. 98- 549, § 2, 98 Stat. 2780 (1984) (defining "cable service," as relevant here, to include "one-way transmission to subscribers of . . . other programming service, . . . with subscriber interaction, if any, which is required for [its] selection").

[115] 47 C.F.R. § 76.5(ee).

[116] Pub. L. 98- 549, § 2, 98 Stat. 2780.

Protocol (IP) address and user identification so that users may individually interact with their independently selected Internet destinations. The 1984 Cable Act's legislative history specifically notes that the various capabilities Internet access provides – "shop-at-home and bank-at-home services, electronic mail, . . . two-way transmission o[f] non-video data . . . not offered to all subscribers" – are "*non-cable services*."[117]

AT&T argues that, although some aspects of Internet access "are not themselves cable services," other aspects do "satisfy the definition."[118] AT&T's argument thus appears to be that as long as some "cable service" is added to the mix of features included with Internet access, the entire service becomes an undivided "cable service." But the Commission has already rejected the notion that the classification of "Internet access" should vary based on the make-up of a particular provider's service offering. Internet access providers do not provide "separate services – electronic mail, Web browsing, and others – that should be deemed to have separate legal status."[119] Rather they provide one service – "Internet access" – that is subject to one regulatory classification.[120]

It is equally incorrect to argue, as Comcast does, that the 1996 Act transformed Internet access into a "cable service" by adding "or use" to the phrase "subscriber interaction."[121]

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[117] H.R. Rep. No. 98-934, at 44 (emphasis added); *see also* WorldCom at 10 & n.12.

[118] AT&T at 19. The so-called "cable services" that are available over the Internet include "distinctive local content," "national news, sports, entertainment, and other information," "featured" and "frequently visited" web sites, and "the contents of the public internet." *Id.* at 14-16 & n.22.

[119] *Report to Congress*, 13 FCC Rcd at 11539, ¶ 79.

[120] *Id.*

[121] Comcast at 17.

Regardless of how much "subscriber interaction or use" is included within the definition of "cable service," Internet access cannot qualify unless it involves the transmission "to subscribers" of "other programming service." As explained immediately above, it does not.

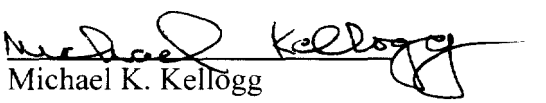
Finally, NCTA asserts that, were the Commission to conclude that Internet access is a "cable service," it would require "minimal modifications to existing rules."[122] That is absurd. If Internet access over coax is a "cable service," so too is the same service provided over any other medium. That means that all such services provided by telephone companies would be removed from Title II regulation. Moreover, all providers of those services – including ISPs such as Earthlink no less than telephone companies such as SBC and BellSouth – would (like the cable companies) be enmeshed in the quagmire of local franchising and federal Cable Act requirements. The attendant impact on providers' willingness to deploy broadband, and the Commission's ability to regulate it, would be anything but "minimal."

[122] NCTA at 13.

CONCLUSION

The Commission should promptly issue a notice of proposed rulemaking that proposes a uniform national broadband policy that takes into account the facilities-based competition existing in the market, and it should act on that notice without delay.

Respectfully submitted,



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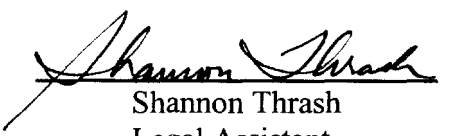
I hereby certify that, on this 10th day of January 2001, I caused one copy of the foregoing *Reply Comments of SBC Communications Inc. and BellSouth Corporation,* to be served upon the following parties by First Class U.S. mail.



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